No. 17310

# In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, A CORPORATION D/B/A SOUTH BAY DAILY BREEZE, RESPONDENT

**On Petition for Enforcement of An Order of the National Labor Relations Board**

## REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD


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1. Respondent disputes the validity of the Board finding that Collins' questioning of Clark about his union membership violated Section 8(a)(1) of the Act, first, by suggesting that the interrogation did not contain an actual or implied threat or promise and that therefore it was privileged (Br. 25-27).

As pointed out in the Board's opening brief (p. 8), however, this Court has recognized that interrogation such as that engaged in by Collins is unlawful because it has a "natural tendency to instill in the minds of

employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B.* v. *West Coast Casket Co.*, 205 F. 2d 902, 904 (C.A. 9). Moreover, where, as here, the interrogation is shown as part of a course of employer conduct designed to defeat the unionization of employees, its illegality is established despite the absence of accompanying threats or promises. *N.L.R.B.* v. *Radcliffe*, 211 F. 2d 309, 314 (C.A. 9), certiorari denied, 348 U.S. 833; *N.L.R.B.* v. *State Center Warehouse & Cold Storage Co.*, 193 F. 2d 156 (C.A. 9).

In the instant case it is manifest that Collins' interrogation of Clark was no mere "innocuous inquiry" (*N.L.R.B.* v. *Hill and Hill Truck Line*, 266 F. 2d 883, 886 (C.A. 5)) but rather, in light of the unlawful treatment to which Clark was subjected immediately thereafter, that the questioning was designed to elicit "information most useful for discrimination". *N.L.R.B.* v. *Firedoor Corporation of America*, 291 F. 2d 328, 331 (C.A. 2). In such circumstances, the interrogation is unlawful because "it is a part of the means by which the employer's hostility carries with it the purpose to retaliate against Union sympathizers * * *." *N.L.R.B.* v. *McGahey*, 233 F. 2d 406, 410 (C.A. 5). See *N.L.R.B.* v. *Chautauqua Hardware Corp.*, 192 F. 2d 492, 494 (C.A. 2); *Stokely Foods Inc.* v. *N.L.R.B.*, 193 F. 2d 736, 738-739 (C.A. 5); *N.L.R.B.* v. *Cen-Tennial Cotton Gin Co.*, 193 F. 2d 502, 503-504 (C.A. 5); *N.L.R.B.* v. *Brown Paper Mill Co.*, 133 F. 2d 988, 989 (C.A. 5); and cf. *N.L.R.B.* v. *Fullerton Publishing Co.*, 283 F. 2d 545, 551 (C.A. 9).

2. Respondent also attacks the Board's finding that Section 8(a)(1) was violated as the result of Collins' interrogation of Clark, on the ground that the complaint did not allege this to be a separate violation of the Act (Br. 26-27). It is apparent, however, that respondent misconceives the function of the complaint in a Board proceeding, for "the Act does not require common law formality in pleading." *N.L.R.B.* v. *Lund*, 103 F. 2d 815, 820 (C.A. 8). Thus under settled law, a complaint in an unfair labor practice proceeding may be amended at any time during a hearing. Section 10(b); *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 224-225; *N.L.R.B.* v. *Dinion Coil Co.*, 201 F. 2d 484, 491 (C.A. 2). But prejudice does not necessarily follow from failure to formally amend the complaint to specify every facet of the conduct under consideration where, as here, it is clear from the evidence presented and the record of the hearing that the respondent "understood the issue and was afforded full opportunity to justify [its conduct] as innocent rather than discriminatory." *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-350. Accord, *N.L.R.B.* v. *Armato*, 199 F. 2d 800, 804 (C.A. 7); *Eagle-Picher Mining & Smelting Co.* v. *N.L.R.B.*, 119 F. 2d 903, 910 (C.A. 8); *Fort Wayne Corrugated Paper Co.* v. *N.L.R.B.*, 111 F. 2d 869, 873 (C.A. 7). Under such circumstances, the Board may *sua sponte* make conformity between the pleadings and the proof implicit in its findings. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, *supra*, 304 U.S. at 349-350; *N.L.R.B.* v. *Midwest Transfer Co.*, 287 F. 2d 443, 445-446 (C.A. 3); *N.L.R.B.* v. *Somerset Classics*, 193 F. 2d

613, 615 (C.A. 2), certiorari denied, 344 U.S. 816; cf. *American Newspaper Publishers Ass'n* v. *N.L.R.B.*, 193 F. 2d 782, 798 (C.A. 7), certiorari denied, 344 U.S. 816. This procedure is comparable to Rule 15 (b) of the Federal Rules of Civil Procedure which permits amendment of pleadings to conform to the evidence (see *N.L.R.B.* v. *Roure-Dupont Mfg. Co.*, 199 F. 2d 631, 633 (C.A. 2)), and also states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

Respondent understood at the hearing that Collins' interrogation of Clark was in issue. Clark testified concerning the incident on direct examination (R. 40-41), and respondent had an opportunity through cross-examination and through the introduction of its own evidence to counter the effect of that testimony. Respondent did not follow that course, however. Rather, Collins testifying as respondent's witness, admitted on direct examination that he had engaged in the interrogation of Clark (R. 261). Respondent thus was aware that Collins' interrogation would be considered at least as a factor, in determining the motivation behind the discharge of Clark, an action which the complaint expressly alleged to be violative of the Act (R. 4). Further, it is recognized that where the Board's jurisdiction is invoked by a complaint alleging one unfair labor practice, "any unfair labor practices

growing out of and related to this form of violation come within the Board's authority." *N.L.R.B.* v. *Somerset Classics, Inc.*, *supra*, 193 F. 2d at 615; *Stewart Die Casting Corp.* v. *N.L.R.B.*, 114 F. 2d 849, 856-857 (C.A. 7), certiorari denied, 312 U.S. 680; see also *N.L.R.B.* v. *Fant Milling Co.*, 360 U.S. 301, 306-309; *N.L.R.B.* v. *Pallette Stone Corp.*, 283 F. 2d 641, 642 (C.A. 2). Accordingly, respondent was sufficiently informed that the interrogation was under consideration not only as an element of proof in connection with Clark's discharge, but in addition, as the basis for a possible finding of a separate violation of the Act. See *Republic Steel Corp.* v. *N.L.R.B.*, 107 F. 2d 472, 478-479 (C.A. 3), modified on other grounds, 311 U.S. 7; *N.L.R.B.* v. *Midwest Transfer Co.*, *supra*, 287 F. 2d at 445-446.[1]

If respondent had believed that the Board improperly found this interrogation to be violative of Section 8(a)(1) of the Act, respondent could have moved for reconsideration or modification of the Board's order. Under Section 102.49 of the Board's Rules and Regulations (29 C.F.R. 193, 1961 Cum. Pocket Supp.) and Section 10(d) of the Act, the Board could have reconsidered its decision and order at any time during the approximately two-and-a-half months between its

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[1] As a rule, where specific facts are set out in a pleading, it is not necessary to state the legal conclusion to be drawn from such facts. 71 *Corpus Juris Secundum*, Pleading § 15; *Walker* v. *Calloway*, 99 Cal. App. 2d 675, 681, 222 P. 2d 445, 459; *Notten* v. *Mensing*, 3 Cal. 2d 469, 477, 45 P. 2d 198, 202.

issuance on February 9, 1961, and the filing of the record in Court in connection with this litigation, on April 26, 1961.[2] On such a motion for reconsideration, respondent could have urged that Collins' interrogation was not violative of the Act. By its failure to pursue such a course of action, respondent is foreclosed at this stage from claiming prejudice as a result of the Board's finding. Cf. *Utica-Observer Dispatch* v. *N.L.R.B.*, 229 F. 2d 575, 577-578 (C.A. 2); 3 *Davis, Administrative Law Treatise* 104.

3. With respect to the Board's conclusion that respondent's treatment of employee Clark violated Section 8(a)(3) and (1) of the Act, respondent argues that even if it had a discriminatory intent in offering Clark the new position as a condition of continued employment, its conduct was not unlawful because the offer had no adverse effect on the employment conditions of its employees and therefore did not

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[2] Section 102.49 of the Board's Rules and Regulations reads in relevant part:

> *Modification or setting aside of order of Board before record filed in court; action thereafter.*—Within the limitations of the provisions of section 10(c) of the act, and section 102.48 of these rules, until a transcript of the record in a case shall have been filed in a court, within the meaning of section 10 of the act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it.

Section 10(d) of the Act provides as follows:

> Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

tend to discourage union membership (Br. 10-25).[3]

In making this argument respondent relies heavily on *N.L.R.B.* v. *W. L. Rives Co.*, 288 F. 2d 511 (C.A. 5) (Br. 14-16, 19-20, 22, 24-25). The *Rives* case, however, involved an employer, described by the court (288 F. 2d at 512) as "caught 'between the devil and the deep blue'." For that case arose from a jurisdictional dispute between two unions, and the employer, in an attempt to reach a *modus vivendi*, subcontracted certain work in order to obtain for its product the label of a union other than the certified bargaining representative. The court noted that the employer had no hostility to either of the unions "or to trade unionism generally" (288 F. 2d at 513), and held that because there was no intent to dis-

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[3] There is nothing in the Board's findings to sustain respondent's assumption that the job offer to Clark did not have an adverse effect on employees in respondent's plant. Thus, the fact that Clark did not want the job that was offered him is evidenced by his selecting dismissal over acceptance of it. Respondent errs in its assertion that the Trial Examiner found that the offer of the new position did not cause Clark to leave respondent's employ (Br. 17). Rather, the Examiner's finding was that Clark did not accept the position because he had the union representative's assurance that if he lost his job through no fault of his own, he could get other employment (R. 16). Hence, not only was Clark adversely affected as the result of respondent's action, but other employees were thereby warned that union considerations might well be the basis for respondent's effecting unwanted changes in their working conditions. "Moreover, the Act does not require that the employees discriminated against be the ones encouraged [or discouraged] for purposes of violations of § 8(a)(3)" *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 51; accord: *N.L.R.B.* v. *Richards*, 265 F. 2d 855, 861 (C.A. 3); and see *Wells, Inc.* v. *N.L.R.B.*, 162 F. 2d 457 (C.A. 9).

courage or encourage union membership, the employer's action did not violate Section 8(a)(3) and (1) of the Act. The court examined the effect of the discrimination in that case, presumably, only because had there been an effect, the employer's unlawful intent could then have been presumed in accordance with *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 44-45. Hence, if the employer in *Rives* had had the intent to discourage union activity which, as we have shown in our opening brief (pp. 6-9), respondent had herein, the employer's conduct would have been held unlawful. Cf. *Pittsburgh-Des Moines Steel Co.* v. *N.L.R.B.*, 284 F. 2d 74, 81-83 (C.A. 9).

As we have previously indicated, once it is shown that a change in an employee's employment relationship was effected for the proscribed purpose of discouraging union activity, the violation of Section 8(a)(3) is established without regard to whether the action is detrimental to the individual affected.[4] This principal was succinctly stated recently by the Second Circuit as follows (*N.L.R.B.* v. *Local 138, International Union of Operating Engineers*, 293 F. 2d 187, 197):

> * * * Whether the employee was discharged or only transferred is immaterial; no monetary loss to the employee is necessary to constitute a violation. *N.L.R.B.* v. *Milco Undergarment Co.*, 3 Cir., 1954, 212 F. 2d 801, 802, certiorari denied 1954, 348 U.S. 888, 75 S. Ct. 208, 99 L.Ed. 697.

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[4] Pp. 10-11 of the Board's opening brief. In addition to cases cited therein, see *Montgomery Ward & Co.* v. *N.L.R.B.*, 107 F. 2d 555, 563-564 (C.A. 7).

In order to hold the employer, however, there must at least be proof that he knew he was acting for an impermissible cause. For 'The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8(a)(3) and its predecessor,' *Radio Officers' Union, etc.* v. *N.L.R.B.*, 1954, 347 U.S. 17, 43, 74 S. Ct. 323, 337, 98 L.Ed. 455, or, as recently said by Hr. Justice Harlan, concurring, in *Local 357, I.B.T., etc.* v. *N.L.R.B., supra*, 365 U.S. at page 680, 81 S. Ct. at page 842, 'In general, this Court has assumed that a finding of a violation of § § 8(a) 3, or 8(b) 2, requires an affirmative showing of a *motivation* of encouraging or discouraging union status or activity.' [5]

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[5] Respondent's assertion that the term "discrimination" connotes an "injurious or adverse effect" (Br. 23) not only is refuted by the quoted language from the Second Circuit opinion, but is contrary to the usual interpretation of such statutory language. Thus, Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526, 15 U.S.C. 13(a)), provides that it shall be unlawful "to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." In *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, it was urged that the mere showing of a price difference was not enough to establish discrimination within the meaning of Section 2(a). The Supreme Court rejected the contention, concluding that (363 U.S. at 549): "there are no overtones of business buccaneering in the Section 2(a) phrase 'discriminate in price.' Rather a price discrimination within the meaning of that provision is merely a price difference."

## CONCLUSION

For these reasons, as well as those set forth in our opening brief, we respectfully submit that a decree should issue enforcing the order of the Board in full.

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